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Public Prosecutor v Tiong King Guan & Anor

B COURT OF APPEAL (KUCHING) — CRIMINAL APPEAL NO Q-09–318–11 OF 2014
ZAWAWI SALLEH, IDRUS HARUN AND ABDUL RAHMAN SEBLI JJCA
23 FEBRUARY 2015

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Criminal Procedure — Appeal — Appeal against acquittal — Respondents charged together with a principal offender for abetting in committing murder under ss 109 & 302 of the Penal Code — Principal offender pleading guilty to alternative charge of culpable homicide not amounting to murder under s 304(a) of
D *the Code — Trial judge ordering discharge not amounting to acquittal — Prosecution proffering amended charge under s 304(a) read with s 109 of the Code but later reverting to original charge of abetment in the murder under ss 109 & 302 — Whether an abuse of process for prosecution to revert to abetment of*
E *murder charge — Whether public prosecutor estopped from reverting to charge under s 302*

Criminal Procedure — Charge — Alteration or amendment of charge
F *— Respondents charged together with a principal offender for abetting in committing murder under ss 109 & 302 of the Penal Code — Principal offender pleading guilty to alternative charge of culpable homicide not amounting to murder under s 304(a) of the Code — Trial judge ordering discharge not amounting to acquittal — Prosecution proffering amended charge under s 304(a) read with s*
G *109 of the Code but later reverting to original charge of abetment in the murder under ss 109 & 302 — Whether an abuse of process for prosecution to revert to abetment of murder charge — Whether public prosecutor estopped from reverting to charge under s 302*

H *Criminal Procedure — Consent or sanction — Consent — Transmission of cases to High Court — Whether sessions court judge may question or reject public prosecutor's decision to transfer case to High Court on a more serious charge — Criminal Procedure Code s 177A*

I In the High Court one Ling Hoe Ing ('Ling') was charged before Supang Lian J with the murder of the late Wong Jing Kui under s 302 of the Penal Code ('PC'). The first and second respondents were charged under ss 109 and 302 of the PC read together with s 34 of the PC with abetting Ling in the murder. Pursuant to a letter of representation by Ling, the public prosecutor ('PP')

offered him an alternative charge of culpable homicide not amounting to murder under s 304(a) of the PC. Ling pleaded guilty to the alternative charge and was sentenced to 16 years imprisonment. He was acquitted of the principal murder charge. Based on the admitted facts, what Ling did to the deceased was an act of murder within the meaning of s 300 of the PC. Pursuant to a recusal application by the respondents, the conduct of the trial was taken over by Judicial Commissioner Azhahari Kamal Ramli ('the JC') from Supang Lian J. Counsel for the respondents raised a preliminary objection on the ground that since Ling had been acquitted of the murder, the charge against the respondents for abetting him in the murder was unsustainable in law. The JC acceded to the respondents' objection and ruled that the abetment of murder charge as it stood was 'defective, unsustainable and prejudicial'. Consequently he ordered both respondents to be discharged not amounting to acquittal. The PP then proffered an amended charge under s 304(a) read with s 109 of the PC against the respondents in the sessions court. However, on the first day of trial before the sessions court, the PP decided to revert to the original charge of abetting in the murder, with a slight variation by adding the element of conspiracy. The charge now was under ss 109 and 302 of the PC read together with s 34 of the PC. The prosecution then applied for the case to be transmitted to the High Court pursuant to s 177A of the Criminal Procedure Code ('the CPC'). The learned sessions court judge ('SCJ') upheld the respondent's objection to this by quashing the charge and ordering the respondents to be discharged not amounting to acquittal. The SCJ held that it was an abuse of process for the prosecution to revert to the abetment of murder charge after the same charge had been 'quashed' by the learned JC earlier. The PP applied to the High Court for revision asking for the SCJ's order to be set aside and for the High Court to proceed with the case in accordance with s 177A of the CPC. Lee Heng Cheong J ('the judge') refused the prosecution's application and instead sent the case back to the sessions court for trial under s 304(a) read with ss 109 of the PC. The respondents were also ordered to be released on bail. The PP appealed against the judge's decision. The sole issue for determination was whether the judge was right in remitting the case back to the sessions court for trial of an offence under s 304(a) read with ss 109 of the PC instead of dealing with the case in accordance with s 177A of the CPC.

Held, allowing the public prosecutor's appeal and ordering the case be reverted to the High Court for trial before another judge:

(1) No appeal was filed by the prosecution against the JC's decision to discharge the respondents. The judge's view was that since the prosecution did not appeal against the discharge order, they were estopped from reverting to the abetment of murder charge under s 302 read with ss 109 and 34 of the PC. The judge concluded that since no appeal was filed by the PP, the order of discharge remained valid and subsisting and was binding on him. While the judge was right in holding

that the discharge order was valid and subsisting, he was wrong in ruling that by reason of the subsistence of the order the PP was estopped from reverting to the charge under s 302 read with ss 109 and 34 of the PC. The discharge order not amounting to acquittal was not an appealable order as it was a procedural ruling which did not dispose of the rights of the parties. Further, as the rights of the parties had not been finally determined when the discharge order was made, it was open to the PP to re-charge the respondents with the same offence or with any other offence he deemed fit. It would be different if the discharge order had amounted to an acquittal. The prosecution was therefore right in the circumstances not to appeal against the discharge order (see paras 21–25).

(2) The discretion lies absolutely with the attorney general in his capacity as PP to continue or to discontinue any criminal proceedings against any person under any penal law. This power is conferred by art 145(3) of the Federal Constitution and is not questionable in any court of law. Anyone who is dissatisfied with his decision should seek his remedy elsewhere, but not in the courts. What the sessions court and the High Courts did in the present case was to practically deny the PP of his discretionary power and constitutional right to proceed under s 302 read with ss 109 and 34 of the PC; *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 referred (see paras 26–27 & 35).

(3) The procedure is that when a charge for an offence triable by the High Court is tendered before a subordinate court, the duty of the magistrate or sessions court judge is to simply transmit the case to the High Court pursuant to s 177A of the CPC. It was beyond the jurisdiction of the SCJ to question and to decide on the legal technicalities of the charge. Neither was it his function to question the wisdom of the PP in deciding to proceed with the more serious charge under s 302 read with ss 109 and 34 of the PC rather than the less serious charge under s 304(a) read with s 109 of the PC (see paras 35–36).

(4) Section 177A of the CPC is couched in mandatory language. Thus, the SCJ had no discretion not to transmit the case to the High Court, let alone to have 'quashed' the charge and to release the respondents without condition, bearing in mind this was a non-bailable offence (see para 37).

(5) Given the clear wording of s 177A(3) of the CPC, what the judge should have done when the case came up for revision before him was to set aside the order of discharge made by the SCJ and to fix a trial date and order the respondents to be remanded in custody pending disposal of the case (see para 38).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, seorang yang bernama Ling Hoe Ing ('Ling') dipertuduh di hadapan Supang Lian H dengan kesalahan membunuh seorang yang bernama Wong Jing Kui di bawah s 302 Kanun Keseksaan ('KK'). Responden pertama dan kedua dipertuduh di bawah ss 109 dan 302 KK dibaca sekali dengan s 34 KK iaitu bersubahat dengan Ling dalam pembunuhan tersebut. Berikutan surat perwakilan oleh Ling, pendakwa raya ('PR') menawarkan pertuduhan alternatif iaitu pembunuhan yang tidak terjumlah kepada pembunuhan di bawah s 304(a) KK. Ling memplidkan bersalah terhadap pertuduhan alternatif tersebut dan dijatuhkan hukuman 16 tahun penjara. Dia dibebaskan daripada pertuduhan utama iaitu pembunuhan. Berdasarkan fakta yang diperakui, apa yang Ling lakukan kepada si mati adalah tindakan membunuh dalam maksud s 300 KK. Berikutan permohonan menarik diri oleh responden-responden, pengendalian perbicaraan diambil alih oleh Pesuruhjaya Kehakiman Azhahari Kamal Ramli ('PK') daripada Supang Lian H. Peguam responden-responden membangkitkan bantahan awal atas alasan bahawa memandangkan Ling telah dibebaskan daripada pembunuhan, pertuduhan terhadap responden-responden kerana bersubahat dengannya dalam pembunuhan tidak boleh kekal di bawah undang-undang. PK bersetuju dengan bantahan responden-responden dan memutuskan bahawa subahat pertuduhan pembunuhan adalah cacat, tidak boleh dikekalkan dan memudaratkan. Oleh itu, dia mengarahkan kedua-dua respon agar dilepaskan tetapi tidak terjumlah kepada pembebasan. PR seterusnya menawarkan satu pertuduhan terpinda di bawah s 304(a) yang dibaca bersekali dengan s 109 KK terhadap responden-responden di mahkamah sesyen. Walau bagaimanapun, pada hari pertama di mahkamah sesyen, PR memutuskan untuk kembali ke pertuduhan asal iaitu bersubahat dalam pembunuhan, dengan sedikit variasi iaitu dengan menambah elemen konspirasi. Pertuduhan kini adalah di bawah ss 109 dan 302 KK dibaca bersekali dengan s 34 KK. Pihak pendakwaan seterusnya memohon agar kes ini dipindahkan ke Mahkamah Tinggi berikutan s 177A Kanun Tatacara Jenayah ('KTJ'). Hakim mahkamah sesyen ('HMS') mengekalkan bantahan responden dengan membatalkan pertuduhan dan mengarahkan responden-responden dilepaskan tetapi tidak terjumlah kepada pembebasan. HMS memutuskan bahawa ia adalah salahguna proses untuk pihak pendakwaan kembali kepada pertuduhan subahat dalam pembunuhan selepas pertuduhan yang sama 'dibatalkan' oleh PK terdahulu. PR memohon kepada Mahkamah Tinggi bagi semakan iaitu permohonan agar perintah HMS diketepikan dan agar Mahkamah Tinggi meneruskan dengan kes selaras dengan s 177A KTJ. Lee Heng Cheong H ('hakim') menolak permohonan pihak pendakwaan dan sebaliknya mengembalikan kes tersebut kepada mahkamah sesyen bagi perbicaraan di bawah s 304(a) dibaca bersekali dengan s 100 KTJ. Responden-responden juga diarahkan dilepaskan dengan ikat jamin. PR merayu terhadap keputusan hakim. Satu-satunya isu bagi pemutusan adalah sama ada hakim betul dalam

mengembalikan kes tersebut kepada Mahkamah Sesyen bagi perbicaraan satu kesalahan di bawah s 304(a) yang dibaca bersekali dengan s 109 KK dan bukan menangani kes tersebut selaras dengan s 177A KTJ.

Diputuskan, membenarkan rayuan pihak pendakwaan dan mengarahkan agar kes dikembalikan ke Mahkamah Tinggi bagi perbicaraan di hadapan hakim yang lain:

(1) Tiada rayuan yang difailkan oleh pihak pendakwaan terhadap keputusan PK untuk melepaskan responden-responden. Pandangan hakim adalah bahawa memandangkan pihak pendakwaan tidak merayu terhadap perintah pelepasan, mereka diestop daripada kembali ke pertuduhan subahat membunuh di bawah s 302 dibaca bersama-sama dengan ss 109 dan 34 KK. Hakim memutuskan bahawa memandangkan tiada rayuan yang difailkan oleh PR, perintah pelepasan kekal sah dan wujud dan mengikat terhadapnya. Walaupun hakim betul dalam memutuskan bahawa perintah pelepasan adalah sah dan wujud, beliau khilaf dalam memutuskan bahawa oleh kerana kewujudan perintah tersebut, PR diestop daripada kembali ke pertuduhan di bawah s 302 dibaca bersama-sama dengan ss 109 dan 34 KK. Perintah pelepasan yang tidak terjumlah kepada pembebasan bukanlah perintah boleh rayu kerana ia adalah keputusan yang bersifat prosedur yang tidak melupuskan hak-hak pihak-pihak. Selanjutnya, oleh kerana hak-hak pihak-pihak belum diputuskan sepenuhnya apabila perintah pelepasan dibuat, ia bukanlah untuk PR mempertuduh responden-responden semula dengan kesalahan yang sama atau dengan kesalahan lain yang dirasakannya sesuai. Ia akan berbeza sekiranya perintah pelepasan terjumlah kepada pembebasan. Oleh itu, pihak pendakwaan betul dalam hal keadaan tidak merayu terhadap perintah pelepasan (lihat perenggan 21–25).

(2) Budi bicara terletak pada peguam negara dalam kapasitinya sebagai PR untuk meneruskan atau tidak dengan prosiding jenayah terhadap mana-mana undang-undang bersifat penal. Kuasa ini diberikan oleh perkara 145(3) Perlembagaan Persekutuan dan tidak boleh dipersoalkan dalam mana-mana mahkamah undang-undang. Sesiapa yang tidak berpuas hati dengan keputusan beliau mestilah mendapat remedi dari tempat lain tetapi bukan di mahkamah-mahkamah. Apa yang mahkamah sesyen dan Mahkamah-mahkamah Tinggi lakukan dalam kes ini adalah menafikan PR kuasa budibicara dan perlembagaan beliau untuk meneruskan di bawah s 302 dibaca bersama-sama dengan ss 109 dan 34 KK; *Long bin Samat & Ors v PP* [1974] 2 MLJ 152 dirujuk (lihat perenggan 26–27 & 35).

(3) Prosedurnya adalah apabila satu pertuduhan bagi pertuduhan yang boleh dibicarakan oleh Mahkamah Tinggi dikemukakan di mahkamah bawahan. Tugas majistret atau hakim mahkamah sesyen hanyalah

memindahkan kes tersebut ke Mahkamah Tinggi di bawah s 177A KTJ. Ia melampaui bidang kuasa HMS untuk mempersoal dan untuk memutuskan mengenai sifat teknikaliti perundangan pertuduhan tersebut. Begitu juga dengan fungsi beliau untuk mempersoalkan kebijaksanaan PR dalam memutuskan untuk meneruskan dengan pertuduhan yang lebih serius di bawah s 302 dibaca bersama-sama dengan ss 109 dan 34 KK berbanding pertuduhan yang kurang serius di bawah s 304(a) dibaca bersama-sama denga s 109 KK (lihat perenggan 35–36).

(4) Seksyen 177A KTJ berasaskan bahas mandatori. Oleh itu, HMS tidak mempunyai bidang kuasa untuk tidak memindahkan kes tersebut ke Mahkamah Tinggi, apatah lagi untuk 'membatalkan' pertuduhan dan tidak melepaskan responden-responden tanpa syarat, dengan ingatan bahawa ia adalah kesalahan yang tidak boleh diikatjanji (lihat perenggan 37).

(5) Melihat pada perkataan jelas s 177A(3) KTJ, apa yang harus dilakukan oleh hakim apabila kes timbul untuk semakan adalah mengenepikan pertuduhan yang dibuat oleh SCJ dan menetapkan tarikh perbicaraan dan memerintahkan responden-responden direman dalam jagaan sementara menunggu pelupusan kes (lihat perenggan 38).]

Notes

For cases on alteration or amendment of charge, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1177–1286.

For cases on appeal against acquittal, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 180–213.

For cases on consent, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1731–1747.

Cases referred to

Indran & Anor v PP [1985] 1 MLJ 326 (refd)

Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (folld)

Hui Chi-ming v R [1992] 1 AC 34, PC (refd)

Maleb bin Su v PP [1984] 1 MLJ 311; [1984] 2 CLJ (Rep) 232 (refd)

Pendakwa Raya lwn Mat Saad bin Mat Isa & 2 lagi [2005] 1 AMR 29, HC (distd)

PP v RK Menon & Anor [1978] 2 MLJ 152; [1977] 1 LNS 101 (refd)

Sanjeev Kumar a/l Veerasingam v Public Prosecutor and other appeals [2015] 2 MLJ 589, CA (distd)

Legislation referred to

Courts of Judicature Act 1964 s 3

Criminal Procedure Code s 177A, 177A(3), 314

Federal Constitution art 145(3)
Penal Code ss 34, 109, 300, 302, 304(a)
Rules of the Court of Appeal 1994 r 16(2)

Appeal from: Criminal Appeal No SBW-43–2/9 of 2014 (High Court, Sibu)

Muhamad Iskandar bin Ahmad (Mirza bt Mohamad with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the appellant.
Orlando Chua (Wong, Orlando Chua & Kuok) for the first respondent.
Roger Chin (Roger Chin & Co) for the second respondent.

Abdul Rahman Sebli JCA:

[1] In the High Court at Sibu, Sarawak one Ling Hoe Ing was charged before Supang Lian J with the murder of the late Wong Jing Kui and the charge against him was as follows:

> That you, on 14th June 2012 at about 1.30 am, at house No 1D, Lorong 33A, Ulu Sg Merah, Sibu, in the district of Sibu, in the State of Sarawak, committed murder by causing the death of one WONG JING KUI (9810119-13-5215) and that you have thereby committed an offence punishable under section 302 of the Penal Code.

[2] The first and second respondents were charged with abetting him in the murder and the charge against them was as follows:

> That you on 14th June 2012 at about 1.30 am at House No 1D, Lorong 33A, Ulu Sungai Merah, in the district of Sibu, in the State of Sarawak, in furtherance of common intention of you all, abetted one LING HOE ING (881018-13-5871) in the commission of murder of one WONG JING KUI (810119-13-5215), which offence was committed in consequence of your abetment, and that you have thereby committed an offence punishable under section 109 and section 302 of the Penal Code and read together with section 34 of the same code.

[3] The offence carries the mandatory death sentence upon conviction. On 21 January 2013 the learned judge allowed the prosecution's application for a joint trial. However, pursuant to a letter of representation by Ling Hoe Ing, the public prosecutor on 1 October 2013 offered him an alternative charge under s 304(a) of the Penal Code ('the Code'), which reads:

> That you, on the 14th June 2012 at about 1.30 am, at house No 1D, Lorong 33A, Ulu Sg Merah, Sibu, in the district of Sibu, in the State of Sarawak, based on the instigation by Tiong King Guan (861110-52-6121) and based on the conspiracy between Tiong King Guan (861110-52-6121) and Ling Hang Tsyr (810508-13-5278) to commit murder against Wong Jing Kui (810110-13-5215), caused the death of Wong Jing Kui (810119- 13-5215), with the intention of causing death and that you have thereby committed an offence of culpable

homicide not amounting to murder punishable under section 304(a) of the Penal Code. A

[4] He pleaded guilty to the alternative charge and was sentenced to 16 years imprisonment with effect from his date of arrest. He was acquitted of the principal murder charge. The brief facts of case marked as exh P3 was admitted to be correct by Ling Hoe Ing. All elements of the offence with which he was charged were present in the brief facts. B

[5] Among the facts admitted was that he was instructed and instigated by the first respondent to kill his girlfriend's husband before 20 June 2012. The first respondent's girlfriend is the second respondent. Ling Hoe Ing agreed to carry out the murder for money as he was desperate to settle his debt with his employer amounting to RM13,000. His employer had threatened to chop off his hands and legs if he failed to pay the debt. It was agreed that if the murder was successful, the debt would be paid off by the first respondent. The deceased was a bank manager at the time of his death. C D

[6] The modus operandi was for the second respondent to leave the back door to their house unlocked to facilitate Ling Hoe Ing's entry. Also to be left unlocked was the door to her husband's bedroom. He was to be killed while he was sleeping. On 14 June 2012 at about 1.30am Ling Hoe Ing carried out the murder as planned. The deceased put up a fight but was overpowered. E

[7] During the murder the second respondent and her young son were present in the room but she did nothing to help her husband when Ling Hoe Ing stabbed him several times in the body and neck using a knife. In fact, when her son started crying and calling 'papa, papa' after seeing his father being brutally murdered, the second respondent covered his mouth with a blanket to silence him. F G

[8] We find it necessary to relate the admitted facts in this judgment as they establish, in point of law, that what Ling Hoe Ing did to the deceased was an act of murder within the meaning of s 300 of the Code notwithstanding his plea of guilt to a lesser offence of culpable homicide not amounting to murder under s 304(a) of the same Code. Section 300 of the Code provides as follows: H

300 Murder

Except in the cases hereinafter excepted, culpable homicide is murder — I

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[9] With the conviction of Ling Hoe Ing under s 304(a) of the Code, counsel for the respondents applied for the learned judge to recuse herself on the ground that her mind would have been prejudiced by the facts as outlined in exh P3. The learned judge then indicated to the parties that she would write to the Honourable Chief Judge of Sabah and Sarawak for advice on the next course of action.

[10] On 20 January 2014, presumably upon the recusal of Supang Lian J, the conduct of the trial was taken over by the learned Judicial Commissioner Azhahari Kamal Ramli ('the learned JC'). At the outset of the proceeding, counsel for the respondents raised a preliminary objection on the ground that since Ling Hoe Ing had been acquitted of the murder of Wong Jing Kui, the charge against the first and second respondents for abetting him in the murder was unsustainable in law and urged the learned JC to quash the charge. Ruling was reserved to 26 February 2014.

[11] On 26 February 2014 the learned JC delivered his ruling. He acceded to the respondents' objection and ruled that the abetment of murder charge as it stood was 'defective, unsustainable and prejudicial'. Consequently he ordered both respondents to be discharged not amounting to acquittal. He however said that the public prosecutor was at liberty to consider amending the charge against the first and second respondents.

[12] Perhaps taking the cue from what the learned JC said, the prosecution on the same day proffered an amended charge under s 304(a) read with s 109 of the Code against the first and second respondents in the sessions court. The new charge was that they abetted Ling Hoe Ing not in the murder of Wong Jing Kui but in committing the lesser offence of culpable homicide not amounting to murder. The charge reads:

> That you jointly, on 14th June 2012 at about 1.30 am, at house No 1D, Lorong 33A, Ulu Sg Merah, in the district of Sibu, in the State of Sarawak, by way of conspiracy abetted one LING HOE ING (881018-13-5871) in the commission of

culpable homicide not amounting to murder of one WONG JING KUI (810119-13-5215), which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under section 109 and section 304(a) of the Penal Code.

[13] The penalty for the offence upon conviction is imprisonment for a term which may extend to 30 years and the offender is also liable to a fine. The first and second respondents claimed trial to the charge and the learned sessions court judge fixed five days for hearing commencing on 8 September 2014. However, on the first day of trial on 8 September 2014, the prosecution decided to revert to the original charge of abetting Ling Hoe Ing in the murder of Wong Jing Kui, with a slight variation by adding the element of conspiracy. The charge against the first and second respondents now reads:

That you, on 14th June 2012 at about 1.30 am, at house No 1D, Lorong 33A, Ulu Sg Merah, Sibu, in the district of Sibu, in the State of Sarawak, in furtherance of the common intention of you all, by way of conspiracy abetted one LING HOE ING (881018-13-5871) in the commission of murder of one WONG JING KUI (810119-13- 5215) which offence was committed in consequence of your abetment and that you have thereby committed an offence under section 109 and section 302 of the Penal Code read together with section 34 of the same Code.

[14] The prosecution then applied for the case to be transmitted to the High Court pursuant to s 177A of the Criminal Procedure Code ('the CPC'). Counsel for the respondents again raised an objection, this time on the ground that the charge was mala fide, oppressive and an abuse of the court process. It was a re-run of the issue raised before the learned JC.

[15] The learned sessions court judge reserved ruling to 10 September 2014, on which date he upheld the objection by quashing the charge and ordering the respondents to be discharged not amounting to acquittal. He agreed with counsel for the first and second respondents that it was an abuse of process for the prosecution to revert to the abetment of murder charge after the same charge had been 'quashed' by the learned JC on 26 February 2014. He went on to say that what the prosecution did was tantamount to contempt of court. The decision of the learned sessions court judge effectively extinguished the charge and set the first and second respondents free without any condition.

[16] Dissatisfied with the order, the public prosecutor applied to the High Court for revision, asking for the order of the sessions court to be set aside and for the High Court to proceed with the case in accordance with s 177A of the CPC.

[17] Having heard submissions from both sides, Lee Heng Cheong J on 23 October 2014 refused to grant the prosecution's application and instead sent

A the case back to the sessions court with an order that the trial for the charge under s 304(a) read with s 109 of the Code or 'such appropriate charges' was to proceed before another sessions court judge. In the meantime he ordered the first and second respondents to be released on bail on the same terms and conditions as those granted by the sessions court in the earlier proceeding.

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[18] Against the learned judge's decision, the public prosecutor appealed to this court. The sole issue for determination before us is whether the learned judge was right in remitting the case back to the sessions court for trial of an C offence under s 304(a) read with s 109 of the Code instead of dealing with the case in accordance with s 177A of the CPC.

[19] Having gone through the record of appeal and the grounds of judgment carefully, it is clear to us that the basis for the learned judge's decision can be D traced back to the public prosecutor's decision to retain the abetment of murder charge under s 302 read with ss 109 and 34 of the Code after the principal offender was offered a reduced charge under s 304(a) of the Code and had pleaded guilty thereto.

E **[20]** This was the issue that was ventilated before the learned JC and which prompted him to discharge the first and second respondents on 26 February 2014. We pause here to note that in actual fact the learned JC did not 'quash' the charge as contended by learned counsel and the learned sessions court judge. It was the learned sessions court judge himself who made such order.

F

[21] No appeal was filed by the prosecution against the learned JC's decision to discharge the first and second appellants. In his ruling at p 7 of the record of appeal, this is how the learned High Court judge dealt with the matter:

G

> [2] However since the Prosecution has failed and/or omitted to appeal against the said Court Order of the YA Azhahari Kamal, quashing or dismissing a charge under section 302 of the Penal Code [read with sections 109 and 34 of the same code] on the grounds that the said charge before him, was 'defective, unsustainable and prejudicial'. This Court finds that the Prosecution is thus estopped from re amending the present charge in the Sessions Court back to a charge under section H 302 of the Penal Code [read with sections 109 and 34 of the same code] and from transmitting this case from the Sessions Court to the High Court. It is noted that the said Court Order arose as a result of a hearing on the merits and is a final order.

[22] As is patently clear from the passage quoted above, the learned judge's I view was that since the prosecution did not appeal against the discharge order, they were estopped from reverting to the abetment of murder charge under s 302 read with ss 109 and 34 of the Code. It was also his view that since the order was made after hearing the merits of the case, it was a final order and therefore appealable. In his full grounds of judgment dated 21 November

2014, the learned judge concluded that since no appeal was filed by the public prosecutor, the order of discharge remains valid and subsisting and was binding on him.

[23] With all due respect to the learned judge, while he was right in holding that the discharge order was valid and subsisting, we are of the view that he was wrong in ruling that by reason of the subsistence of the order the prosecution was estopped from reverting to the charge under s 302 read with ss 109 and 34 of the Code.

[24] In the first place the discharge order not amounting to acquittal was not an appealable order as it was a procedural ruling which did not dispose of the rights of the parties (see *Public Prosecutor v RK Menon & Anor* [1978] 2 MLJ 152; [1977] 1 LNS 101; *Indran & Anor v Public Prosecutor* [1985] 1 MLJ 326; and *Maleb bin Su v Public Prosecutor* [1984] 1 MLJ 311; [1984] 2 CLJ (Rep) 232). Further, s 3 of the Courts of Judicature Act 1964 defines the word 'decision' to mean:

> judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[25] As the rights of the parties had not been finally determined when the discharge order was made, it was open to the public prosecutor to recharge the first and second respondents with the same offence or, for that matter, with any other offence he deemed fit. It would be different if the discharge order had amounted to an acquittal. The prosecution was therefore right in the circumstances not to appeal against the discharge order. If they did, they would have been met with a formidable objection by the first and second respondents, on the authority of the decisions referred to above.

[26] The constitutional position is that the discretion lies absolutely with the attorney general in his capacity as public prosecutor to continue or to discontinue any criminal proceedings against any person under any penal law other than proceedings before a Syariah Court, a Native Court or a Court Martial. This power is conferred by art 145(3) of the Federal Constitution and is not questionable in any court of law. Anyone who is dissatisfied with his decision should seek his remedy elsewhere, but not in the courts.

[27] In saying this we are merely echoing what Suffian LP said in delivering the judgment of the Federal Court in *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 as follows:

> In our view, this clause from the supreme law gives the attorney general very wide discretion over the control and direction of all criminal prosecutions. Not only may

A he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

B **[28]** The first and second respondents raised the issue of mala fide and abuse of process. It was argued that the prosecution acted in bad faith when they decided to proceed with the capital charge under s 302 read with ss 109 and 34 of the Code when the charge against the principal offender, namely Ling Hoe Ing, had been reduced to a lesser offence of culpable homicide not amounting C to murder under s 304(a) of the Code. With the acquittal of the principal offender of the murder charge, there was no murder to abet. So goes the argument of the first and second respondents.

D **[29]** No local authority directly on point was referred to us by either side for our consideration. The High Court case of *Pendakwa Raya lwn Mat Saad bin Mat Isa & 2 lagi* [2005] 1 AMR 29 cited by the learned DPP during the proceedings before the learned JC is not such authority as the facts are materially different in that the abetment of murder charge against the alleged E abettor in that case was amended to an offence under s 304(a) of the Code by the court after the defence had closed its case. The issue of whether a charge of abetment to murder could remain after the principal offender pleaded guilty to the alternative charge under s 304(a) of the Code was not before the court.

F **[30]** The Privy Council case of *Hui Chi-ming v R* [1992] 1 AC 34 is closer to the point. The essential facts are these. 'A' was charged with murder together with three others but two of them pleaded guilty to manslaughter and the other was acquitted. The appellant was initially charged with manslaughter on advice from the Legal Department of the Attorney General's Chambers. But on the G advice of another Crown counsel who was assigned to prosecute the case, the appellant was charged with murder.

[31] 'A' who was the principal offender was acquitted of murder but convicted of manslaughter and was sentenced to six years imprisonment. The H appellant was convicted of murder after a full trial and sentenced to death. Under the circumstances, it was argued on behalf of the appellant that to prosecute the appellant for murder rather than manslaughter amounted to an abuse of process which would have justified and even called for the trial judge's refusal to allow the prosecution to proceed. The appellant's argument in this I regard was as follows:

> The decision of Crown counsel to substitute the original charge of manslaughter with a charge of murder was oppressive and an abuse of the process of the court in the following circumstances: (1) the primary party had been acquitted of murder and convicted of manslaughter; (2) the pleas of the three other participants, of

guilty of manslaughter, had been accepted by the Crown. A

[32] In dismissing the appellant's appeal, the Privy Council held that the prosecution of the appellant for murder rather than manslaughter was not so unfair or wrong as to constitute an abuse of process which should have led the judge to refuse to allow the trial to proceed. It was further held that although the appellant's conviction for murder when the principal offender had been convicted of manslaughter only and the prosecution had accepted pleas of guilty to manslaughter from three other participants was a serious anomaly, there was ample evidence to support the defendant's conviction. B C

[33] Thus, the issue in our view boils down to the question whether the prosecution has sufficient evidence to prove the charge rather than the question whether there was abuse of the court process by the prosecution. If the prosecution proves to be malicious, the remedy lies elsewhere or in taking separate legal action but not by preventing the prosecution from proving its case. This is tantamount to denying thepublic prosecutor, who acts on behalf of the public of the right to be heard. D

[34] Since the trial had not even started, clearly it was too early in the day for both the sessions court and the High Courts to 'quash' or 'dismiss' the charge without hearing the evidence. It is in this respect that the recent decision of the Court of Appeal in *Sanjeev Kumar a/l Veerasingam v Public Prosecutor and other appeals* [2015] 2 MLJ 589 relied on by learned counsel for the first respondent is readily distinguishable. It is obvious in that case that the finding of not guilty against the two appellants (who were charged with abetting the principal offender who was acquitted) was arrived at upon consideration of evidence adduced after a full trial. E F

[35] What the sessions court and the High Courts did in the present case was to practically deny the public prosecutor of his discretionary power and constitutional right to proceed under s 302 read with ss 109 and 34 of the Code. The procedure is that when a charge for an offence triable by the High Court is tendered before a subordinate court, the duty of the magistrate or sessions court judge is to simply transmit the case to the High Court pursuant to s 177A of the CPC. G H

[36] Clearly it was beyond the jurisdiction of the learned sessions court judge to question and to decide on the legal technicalities of the charge. Neither was it his function to question the wisdom of the public prosecutor in deciding to proceed with the more serious charge under s 302 read with ss 109 and 34 of the Code rather than the less serious charge under s 304(a) read with s 109 of the Code. I

[37] Section 177A of the CPC is couched in mandatory language. Thus, the learned sessions court judge had no discretion not to transmit the case to the High Court, let alone to have 'quashed' the charge and to release the first and second respondents without condition, bearing in mind this is a non-bailable offence. Perhaps we should at this juncture reproduce s 177A of the CPC to appreciate its true import:

> *177A Transmission of case to, and trial by, the High Court*
>
> (1) A prosecution in respect of an offence which is to be tried by the High Court in accordance with Chapter XX, shall not be instituted except by or with the consent of the Public Prosecutor:
>
> Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained.
>
> (2) In any prosecution pursuant to subsection (1), the accused shall be produced before the Magistrate's Court which shall, after the charge has been explained to him, transmit the case to the High Court and cause the accused to appear or be brought before that Court as soon as may be practicable:
>
> Provided that when the accused is brought before the Magistrate's Court before the Public Prosecutor has consented to the prosecution, the charge shall be explained to him but he shall not be called upon to plead thereto.
>
> (3) When the accused appears or is brought before the High Court in accordance with subsection (2), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX.

[38] Given the clear wording of sub-s (3) above, what the learned High Court judge should have done when the case came up for revision before him was to set aside the order of discharge made by the learned sessions court judge and to fix a trial date and order the first and second respondents to be remanded in custody pending disposal of the case.

[39] It is unfortunate that the error by the learned JC in the first instance and, with the greatest of respect, aggravated by the decisions of the learned sessions court judge and the learned High Court judge subsequent thereto had resulted in a serious procedural impasse causing the trial to stall even before the prosecution called its first witness. There is a clear disconnect between what s 177A of the CPC requires and what all three courts below had done in dealing with this case.

[40] At the hearing of this appeal on 10 February 2015, the first respondent failed to turn up. This is not totally unexpected as he was also absent when thepublic prosecutor's application for revision came up for hearing before the learned High Court judge on 23 October 2014. According to counsel, the first

respondent had gone to the Sibu High Court by mistake thinking that this appeal was to be heard in Sibu.

[41] However, as the matter involved a pure question of law, learned counsel had no serious objection if the court were to proceed with the hearing in the absence of the first respondent but placed on record a caveat that no adverse order should be made against his client in any event. Presumably learned counsel was referring to the procedure prescribed by s 314 of the CPC for appeals to the High Court, which reads:

> 314(1) If, at the hearing of the appeal, the respondent is not present and the Court is not satisfied that the notice of appeal was duly served upon him, then the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance, and shall issue the requisite notice to him for service through the Registrar.
>
> (2) If the service of the last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence.

[42] The relevant procedural provision relating to appeals to the Court of Appeal is r 16(2) of the Rules of the Court of Appeal 1994 ('the Rules') which stipulates as follows:

> (2) If the appellant appears, and any respondent fails to appear, either in person or by a solicitor, the appeal shall proceed in the absence of such respondent, unless the Court for any sufficient reason sees fit to adjourn the hearing thereof.

[43] It is clear that there is nothing in the Rules to stop the court from proceeding with the hearing in the absence of the first respondent and to make any order it deems fit. In any event, we do not think that the circumstances of the case justified an adjournment of the hearing.

[44] This after all is not a case where the first respondent's absence was due to the fact that he had not been served with the notice of hearing or that he was not aware of the hearing date. He knew of the hearing date except that he went to the Sibu High Court by mistake (that is what counsel told us) instead of the Kuching High Court where the appeal was to be heard. We find it strange that he and his counsel went separate ways for this appeal, one to the Sibu High Court and the other to the Kuching High Court. We can only hazard a guess that there had been a total breakdown of communication between the two.

[45] For all the reasons aforesaid we allowed the public prosecutor's appeal and ordered that the case be reverted to the Sibu High Court for trial before another judge. The second respondent was ordered to be remanded pending final disposal of the case as the offence charged is non-bailable. As for the first

respondent, we ordered for a warrant of arrest to be issued against him to secure his attendance at the trial.

Public prosecutor's appeal allowed and case ordered be reverted to the High Court for trial before another judge.

Reported by Kanesh Sundrum